

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re  
STEPHEN BRIAN TURNER, etc.,  
Debtor.

No. 02-44874 TK  
Chapter 7

AH BENG YEO and E. A.  
MARTINI,  
Plaintiffs,

A.P. No. 02-7273 AT

vs.

STEPHEN B. TURNER, M.D.,  
etc., et al.,  
Defendants.

**MEMORANDUM OF DECISION**

Defendants move for summary judgment in the above-captioned fraudulent transfer action on the ground that the action is barred by the applicable statute of limitations. For the reasons stated below, the motion is denied.

**DISCUSSION**

The above-captioned action (the "Action") was filed in state court (the "State Court") in October 1999. The plaintiffs in the Action (the "Plaintiffs") are judgment creditors of the above-captioned debtor, Stephen B. Turner, M.D. ("Stephen"). On September 9, 2002, Stephen filed the above-captioned chapter 7 bankruptcy case. On December 4, 2002, Stephen filed a notice of removal of the Action

1 to bankruptcy court. The chapter 7 trustee (the "Trustee") has  
2 intervened as the real party in interest in the Action and, with  
3 Court approval, has employed the Plaintiffs' state court counsel as  
4 special counsel.<sup>1</sup> (As used hereinafter, the Plaintiffs shall be  
5 understood to mean the Trustee when referring to post-petition facts  
6 and contentions.)

7 The complaint in the Action (the "Complaint") alleges that, in  
8 1995, Stephen engaged in certain malicious conduct directed against  
9 the Plaintiffs. Based upon this conduct, in August 1998, the  
10 Plaintiffs obtained a judgment against Stephen for approximately \$1  
11 million (the "Judgment"). The Complaint further alleges that, in  
12 1998, Stephen fraudulently transferred his interest in certain real  
13 property (the "Residence") by executing a grant deed in favor of  
14 defendant Real Investment Capital Holdings LLC ("Real LLC"). The  
15 Complaint alleges that this transfer was actually and/or  
16 constructively fraudulent and seeks to avoid it.

17 On June 2, 2003, after the Action was removed to bankruptcy  
18 court, defendants Stephen and Susana C. Turner ("Susana"), Stephen's  
19 former wife, filed a motion for summary judgment. (Collectively,  
20 Stephen and Susana are referred to hereinafter as the "Turners.") In  
21 their motion, the Turners contend that the Plaintiffs' fraudulent  
22 transfer claims are time barred by Cal. Civ. Code § 3439.09. They  
23 note that, in 1992, Stephen and Susana executed a marital  
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25 <sup>1</sup>Section 544(b) of the Bankruptcy Code gives a trustee  
26 standing to bring a fraudulent transfer action under state law as  
long as there is a creditor with an allowable unsecured claim  
against the estate that could do so. 11 U.S.C. § 544(b)(1).

1 transmutation agreement (the "Transmutation Agreement"), converting  
2 their community property interests in the Residence into Susana's  
3 sole and separate property.<sup>2</sup>

4 The Turners note that the applicable state law statute of  
5 limitations is four years after the transfer occurs or one year after  
6 the transfer is discovered with a maximum of seven years after the  
7 transfer occurs. Cal. Civ. Code. § 3439.09(a)-(c).<sup>3</sup> They contend  
8 that the transfer was "made" for purposes of the Action in 1992 when  
9 the Transmutation Agreement was executed. It is undisputed that, if  
10 they are correct, the Action is time barred.

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13 <sup>2</sup>The Turners asserted that the fraudulent transfer claims were  
14 time barred in a previous summary judgment motion filed before the  
15 bankruptcy case was filed. In opposition to the motion, the  
16 Plaintiffs contended, as they do here, that the transfer was not  
17 "made" in 1992 because the Transmutation Agreement was not  
18 recorded. The State Court denied the motion on the ground that  
19 there were triable issues of fact with regard to whether the claims  
20 were time barred. It does not appear that the Plaintiffs cited  
21 Cal. Civ. Code § 3439.06(a) in their opposition. As discussed  
22 below, the Court concludes that the issue is governed by §  
23 3439.06(a) and that the claims are not time barred as a matter of  
24 law.

25 <sup>3</sup>More precisely, a cause of action for avoidance of a  
26 fraudulent transfer is extinguished either four years after the  
transfer is made or one year after the transfer is discovered only  
if the claim is based on actual fraud pursuant to Cal. Civ. Code. §  
3439.04(a). Cal. Civ. Code § 3439.09(a). If the claim is based on  
constructive fraud pursuant to either Cal. Civ. Code § 3439.04(b)  
or § 3439.50, the cause of action is extinguished in all instances  
four years after the transfer is made. Cal. Civ. Code §  
3439.09(b). A claim based on actual fraud is extinguished in any  
event seven years after the transfer is made. Cal. Civ. Code §  
3439.09(c).

1 In support of their contention that a transfer of Stephen's  
2 interest in the Residence was "made" for purposes of Cal. Civ. Code  
3 3439 et seq., the Turners rely primarily on In re Roosevelt, 87 F.3d  
4 311 (9<sup>th</sup> Cir. 1996). Roosevelt involved an objection to the debtor's  
5 chapter 7 discharge on the ground that the debtor had "made" a  
6 fraudulent transfer within one year of filing for bankruptcy. See 11  
7 U.S.C. § 727(a)(2).

8 In Roosevelt, the debtor had executed a marital agreement more  
9 than one year before he filed for bankruptcy, transmuting his  
10 interest in certain real property into his wife's separate property.  
11 Roosevelt, 87 F.3d at 313. Under state law, the transmutation was  
12 effective between the spouses when the agreement was executed even  
13 though it was never recorded. See Cal. Fam. Code § 852(a). However,  
14 under state law, because the agreement was not recorded, it was not  
15 effective against third parties. See Cal. Fam. Code § 852(b). The  
16 issue presented in Roosevelt was whether a transfer is "made" for  
17 purposes of 11 U.S.C. § 727(a)(2) when it is effective between the  
18 parties or only when it is effective against third parties.  
19 Roosevelt, 87 F.3d at 315.

20 The Ninth Circuit noted that, unlike 11 U.S.C. § 548--the  
21 Bankruptcy Code fraudulent transfer statute--11 U.S.C. § 727(a)(2)  
22 contains no definition of when a transfer is "made." Section 548(d)  
23 expressly provides that a transfer is deemed "made" only when it is  
24 effective against third parties. See 11 U.S.C. § 548(d)(1). The  
25 Roosevelt plaintiff contended that, because both § 548(d) and  
26 727(a)(2) pertain to fraudulent transfers, the definition of when a

1 transfer was "made" in § 548(d)(1) should be imported into §  
2 727(a)(2). The Ninth Circuit rejected this contention, concluding  
3 that, in this context, the transfer should be deemed "made" when  
4 effective between the parties. Roosevelt, 87 F.3d at 316-317.

5 The Ninth Circuit noted that the authorities were divided and  
6 the legislative history was unenlightening. In reaching its  
7 conclusion, it was persuaded by the argument that the purposes of 11  
8 U.S.C. § 727(a)(2) and § 548 differ. Section 727(a)(2) focuses on  
9 the debtor's wrongdoing in connection with filing the bankruptcy  
10 case. Section 548 permits the trustee to avoid the transfer so as to  
11 bring the transferred property back into the estate for the benefit  
12 of creditors. The Ninth Circuit concluded that, because recording  
13 statutes are also focused on protecting third parties, it was  
14 reasonable to use the recordation date as the transfer point for §  
15 548. However, it concluded that the same rationale did not apply to  
16 § 727(a)(2) and thus the same rule need not apply. Roosevelt, 87  
17 F.3d at 317.

18 The Turners acknowledge that Roosevelt did not involve a  
19 fraudulent transfer action under the California Civil Code. However,  
20 they contend that the Court should extend the rationale of Roosevelt  
21 to such actions. They contend that federal law, as represented by  
22 Roosevelt, should preempt state law on this issue. They cite no  
23 authority for this proposition.

24 The Plaintiffs oppose the motion for summary judgment. They  
25 note that, unlike 11 U.S.C. § 727(a)(2), the California Civil Code  
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1 does contain a definition of when a transfer is "made" for fraudulent  
2 transfer purposes. Section 3439.06(a) provides as follows:

3 (a) a transfer is made

4 (1) With respect to an asset that is real  
5 property...when the transfer is so far perfected  
6 that a good faith purchaser of the asset from  
7 the debtor against whom applicable law permits  
the transfer to be perfected cannot acquire an  
interest in the asset that is superior to the  
interest of the transferee...."

8 Cal. Civ. Code § 3439.06(a).<sup>4</sup> As recited above, Family Code § 852(b)  
9 states that "[a] transmutation of real property is not effective as  
10 to third parties without notice thereof unless recorded."<sup>5</sup>

11 The Court agrees with the Plaintiffs that, for purposes of the  
12 Action, Cal. Civ. Code § 3439.06(a) governs when the transfer of the  
13 Residence was "made." The Court finds the Turners' contentions  
14 frivolous.<sup>6</sup> The fraudulent transfer claims asserted in the Action are

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15 <sup>4</sup>For purposes of the Action, the transfer was "made"  
16 immediately before the Action was filed. See Cal. Civ. Code §  
17 3439.06(b): "If applicable law permits the transfer to be  
18 perfected as provided in subdivision (a) and the transfer is not so  
19 perfected before the commencement of an action for relief under  
20 this chapter, the transfer is deemed made immediately before the  
21 commencement of the action." At the hearing on the motion, the  
22 Turners argued that this issue should not be governed by an absurd  
23 legal fiction of this sort. The Turners' argument must be directed  
to the California legislature. The Court cannot disregard the  
plain language of § 3439.60(b) simply because the Turners  
characterize it as absurd. Moreover, clearly, if the date an  
unrecorded transfer is effective between the parties is not to  
constitute the date the transfer was made, a deemed date must be  
established. Otherwise, there would be no way to avoid it.

24 <sup>5</sup>Cal. Fam. Code § 851 states that transmutions are subject  
25 to fraudulent transfer law.

26 <sup>6</sup>In their motion for summary judgment, the Turners also  
contended that the Plaintiffs' claims for constructive fraud were  
untenable because Stephen was not insolvent in 1992, when he

1 based on California law. Thus, California law governs the elements  
2 of those claims, including when a transfer is "made." Where the  
3 relevant state law statute has a definition of when a transfer is  
4 "made" and the claim is governed by state law, the Court may not  
5 disregard that definition based on a generalized invocation of the  
6 doctrine of preemption.

7 Moreover, even if the California fraudulent transfer statute did  
8 not contain a definition of when a transfer is "made," the Turners'  
9 claim would still fail. As noted above, the Roosevelt court based  
10 its conclusion on the different purposes served by 11 U.S.C. §  
11 727(a)(2) and 11 U.S.C. § 548. However, Cal. Civ. Code § 3439 et  
12 seq. and 11 U.S.C. § 548 are both fraudulent transfer avoidance  
13 statutes and thus serve the same purpose: i.e., the protection of  
14 creditors. Thus, under the very rationale of Roosevelt, it would  
15 make sense to import the definition of when a transfer was "made" set  
16 forth in § 548 into Cal. Civ. Code § 3439 et seq.

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22 executed the Transmutation Agreement, nor was he rendered insolvent  
23 by executing it. At that point, they note, Stephen had not even  
24 engaged in the conduct that gave rise to the Judgment, and he had  
25 no other debts of any substance. The Plaintiffs did not address  
26 this issue in their opposition. However, the Court finds it  
without merit. The relevant date, for purposes of insolvency as  
well as for statute of limitations purposes, is the date the  
transfer was "made." As discussed above, the transfer is deemed to  
have been made in 1999, just prior to the filing of the Action. By  
that time, the Judgment had been entered. Turner does not contend  
that he was not insolvent at that point.

**CONCLUSION**

The Turners' motion for summary judgment is denied. The Plaintiffs are directed to submit a proposed form of order in accordance with this decision.

Dated: September 2, 2003

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United States Bankruptcy Judge



## PROOF OF SERVICE

I, the undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Northern District of California at Oakland, hereby certify:

That I, in the performance of my duties as such clerk, served a copy of the foregoing document by depositing it in the regular United States mail at Oakland, California, on the date shown below, in a sealed envelope bearing the lawful frank of the Bankruptcy Court, addressed as listed below.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: September \_\_\_, 2003

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